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6 Attorney for Defendant  
EDWARD SHOWALTER  
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10 UNITED STATES DISTRICT COURT  
11 FOR THE CENTRAL DISTRICT OF CALIFORNIA  
12

13 UNITED STATES OF AMERICA, ) SA-CR-06-129-AG  
14 )  
Plaintiff, ) NOTICE OF MOTION; MOTION FOR  
15 ) DECLARATORY RELIEF PURSUANT TO  
v. ) *SANTOBELLO v. NEW YORK*: BREACH  
16 ) OF PLEA AGREEMENT BY  
EDWARD SHOWALTER ) GOVERNMENT; POINTS AND  
17 ) AUTHORITIES; DECLARATION OF  
Defendant. ) COUNSEL; EXHIBITS A & B  
18 )  
\_\_\_\_\_  
19 Date: March 28, 2011  
Time: 9:00 am  
20

21 TO: UNITED STATES ATTORNEY ANDRE BIROTTE AND ASST. U.S. ATTORNEY  
ANDREW STOLPER-

22 Please take notice that, on the above date and time, as soon as  
23 counsel may be heard, the defense will bring the above-captioned  
24 motion in the courtroom of the Hon. Andrew Guilford, 411 W. 4<sup>th</sup> St.,  
25 #10D, Santa Ana, California.

26 Dated: Feb. 8, 2011

S./ H. Dean Steward  
H. Dean Steward  
Counsel for Defendant Showalter  
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1 MOTION

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3 Comes now defendant, together with counsel, and moves this  
4 Honorable Court for a declaratory order that the government has  
5 breached the plea agreement herein. In turn, the defendant then  
6 seeks one of two remedies set out in *Santobello v. New York*, 404  
7 U.S. 257, 262 (1971): withdrawal of his guilty plea, or specific  
8 performance and re-sentencing before a different court.

9 Dated: Feb. 8, 2011

S./ H. Dean Steward

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H. Dean Steward  
Counsel for Defendant  
Edward Showalter

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## 1 I. Introduction

2 As the Court is aware, this matter has been returned from the  
3 9<sup>th</sup> Circuit for re-sentencing, now scheduled for April 25, 2011 at  
4 9:00 AM. The defense here seeks to withdraw the defendant's guilty  
5 plea based, inter alia, on *Santobello v. New York*, 404 U.S. 257,  
6 262 (1971), because the government breached the plea agreement  
7 herein. In the alternative, defendant seeks specific performance of  
8 the plea agreement, and sentencing before a different court.

9 During the second and final sentencing hearing in this matter,  
10 on March 3, 2008, the prosecutor asked the Court to impose a 151  
11 month sentence, being the middle of the Guideline range of 135-  
12 168.<sup>1</sup> [See Ex. A", p. 34, a transcript of the March 3, 2008  
13 sentencing hearing]. The Court imposed that 151 month sentence.

14 This recommendation breached the plea agreement. The  
15 government was obligated:

16  
17 C) ***To recommend that the defendant be sentenced to the***  
18 ***low end*** of the applicable Sentencing Guidelines range provided  
19 the range as calculated by the Court provided that the Court  
20 [sic] does not depart downward in offense level or criminal  
21 history category.

22  
23 Plea agreement, p. 8, lines 10-14, attached as Ex. "B"  
24 [emphasis added]

25  
26 <sup>1</sup> The defense did not and does not agree that this is the correct  
27 Guideline range. However, this is the range that the Court found  
28 during the March, 2008 sentencing hearing.

1 II. Government Breached Plea Agreement

2 The government, during sentencing on March 3, 2008  
3 clearly violated the plea agreement. The prosecution was  
4 obligated to recommend low end, 135 months. For whatever  
5 reason, the prosecutor recommended 151 months, a clear and  
6 unequivocal breach. "[W]hen a plea rests in any significant  
7 degree on a promise or agreement of the prosecutor, ... such  
8 promise must be fulfilled." *Santobello*, supra, at 262,  
9 accord: *U. S. v. De La Fuente*, 8 F.3d 1333, 1340 (9th  
10 Cir.1993).

11 "[P]lea agreements are contractual in nature and are  
12 measured by contract law standards." *Id.* at 1337 (quoting  
13 *U.S. v. Keller*, 902 F.2d 1391, 1393 (9th Cir.1990)). "In  
14 construing the terms of an agreement and the parties'  
15 obligations under it, the courts generally employ traditional  
16 contract principles." G. Nicholas Herman, *Plea Bargaining*, §  
17 10:04, at 190 (1997).

18 III. Remedies

19 In *Santobello*, supra, the Supreme Court addressed the  
20 potential remedies after a finding of a breach of a plea  
21 agreement by the prosecution:

22  
23 "The ultimate relief to which petitioner is entitled we  
24 leave to the discretion of the ... court, which is in a  
25 better position to decide whether the circumstances of  
26 this case require only that there be specific  
27 performance of the agreement on the plea, in which case

petitioner should be re-sentenced by a different judge, or whether, in the view of the ... court, the circumstances require granting the relief sought by petitioner, i.e., the opportunity to withdraw his plea of guilty. We emphasize that this is in no sense to question the fairness of the sentencing judge; the fault here rests on the prosecutor, not on the sentencing judge." *Id.* at 263.

See also *U.S. v. Camper* 66 F.3d 229, 233 (9<sup>th</sup> Cir. 1995), ("Our remand for re-sentencing before a different judge in no way implies criticism of the sentencing judge. Rather, it is done simply to insure compliance with the plea agreement."); *U.S. v. Turner* 951 F.2d 364 (9<sup>th</sup> Cir. 1991); *U.S. v. Partida-Parra* 859 F.2d 629, 633 (9<sup>th</sup> Cir. 1988).

#### IV. Conclusion

Under *Santobello*, the remedies are either 1.) withdrawal of the guilty plea, or 2.) specific performance and re-sentencing by a different court. Defendant seeks an order finding that the government has, in fact, breached the plea agreement herein. He then seeks to withdraw his guilty plea. In the alternative, he seeks specific performance and sentencing before a different court.

Dated: Feb. 8, 2011 s./ H. Dean Steward

H. Dean Steward  
Counsel for Defendant  
Edward Showalter

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2  
3 **CERTIFICATE OF SERVICE**

4  
5 IT IS HEREBY CERTIFIED THAT:

6 I, H. Dean Steward, am a citizen of the United States, and am  
7 at least 18 years of age. My business address is 107 Avenida  
8 Miramar, Ste. C., San Clemente, CA 92672.

9 I am not a party to the above entitled action. I have  
10 caused, on Feb. 8, 2011, service of the defendant's:

11 **NOTICE MOTION; MOTION FOR DECLARATORY RELIEF**

12 on the following parties electronically by filing the  
13 foregoing with the Clerk of the District Court using its ECF  
14 system, which electronically notifies counsel for that party.

15 **AUSA ANDREW STOLPER**

16  
17 I declare under penalty of perjury that the foregoing is true  
18 and correct.

19 Executed on FEB. 8, 2011

20 s./ H. Dean Steward  
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